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In The

Supreme Court of the United States

October Term, 1997

440 COMPANY,

Petitioner,

vs.

BOROUGH OF FORT LEE, a municipal corporation, and the MAYOR and COUNCIL of the BOROUGH OF FORT LEE,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONER

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PRELIMINARY STATEMENT

Neither the Third Circuit nor the Respondents in their opposition brief addressed the central issue presented by this case, namely, the absence of any findings that, as applied to the facts of the current Fort Lee housing market, Ordinance No. 93-33A (the "Ordinance") is rationally related to a legitimate government purpose. Not content with the liberal rational relationship standard accorded municipalities with respect to economic regulations, Respondents ask this Court to disregard the requirements it established in *Pennell v. San Jose*, 485 U.S. 1 (1988), and uphold a regulation that is demonstrably irrational. Rather than address the facts raised in Petitioner's brief, the Respondents merely repeat the standard for determining when a price fixing regulation is constitutional and state in a conclusory manner that they have satisfied that standard. Pursuant to Respondents' rationale, a governing body is free to impose restrictions on the operation of the free market whenever it deems a redistribution of income to be politically expedient.

Respondents fail to cite a single fact specific to the Fort Lee housing market to support its conclusions that the Ordinance has a legitimate purpose and is rationally related to meeting that purpose. The gist of Respondents' argument is that as long as a municipality simply brings an expert into court reciting a magic formula comprised of abstractions, such as rent control "preserves affordable housing stock" and "vacancy decontrol results in large rent increases," a court need not bother to take note of the reality of an existing market that contradicts these platitudes. It is just this kind of hollow reasoning that *Pennell v. San Jose*, 485 U.S. 1 (1988) rejected. The core of the rational relationship test enunciated in *Pennell* is that a governing body cannot justify rent control by crying monopoly or rent gouging in a market where a monopoly does not exist and a high vacancy rate makes the market inherently competitive. By affirming a rent control regulation in a case where

the uncontradicted evidence clearly established the absence of such conditions, the Third Circuit is in conflict with the interpretation of the *Pennell* test enunciated in other circuits. Specifically, in contrast to the instant case where there was no proof that market conditions warranted government interference, in every post-*Pennell* case decided in other circuits, price regulations were upheld because they were enacted to deal with an existing problem that could not be corrected by an unregulated market. *See Gilbert v. City of Cambridge*, 932 F.2d 51 (1st Cir. 1991), *cert. denied*, 502 U.S. 866 (1992); *Richardson v. City of Honolulu*, 124 F.3d 1150 (9th Cir. 1995).

Notably, Respondents appear to be addressing a different adversary altogether. For example, almost a quarter of the opposition brief is a response to an equal protection challenge that was never raised in Petitioner's brief.[1] Paradoxically, Respondents never address or refute the specific facts adduced at trial, such as the absence of a housing shortage or rent gouging in Fort Lee, that support Petitioner's claim that as applied to the market at issue, the Ordinance is arbitrary and counter-productive. Nor do the Respondents explain what bearing the abstract generalities propounded by their expert, such as the need for rent control to address inequities in bargaining power between landlords and tenants, have in a market where the landlords have demonstrated that they have no such power. Appendix F of Petition for a Writ of Certiorari at 130a, 142a.

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1. For the record, Petitioner has no quarrel with the position that a classification that distinguishes between large scale and small scale property owners may be valid. However, nothing in the evidence presented at trial demonstrated that the Ordinance at issue realized such a distinction. On the contrary, the evidence was clear that a number of small scale property owners were affected by the Ordinance. In fact, the vast majority of the buildings impacted by the Ordinance contain six or less units. Appendix E of Petition for a Writ of Certiorari at 118a, 119a.

REPLY TO THE RESPONDENTS' STATEMENT OF FACTS

Respondents' challenge to the testimony and report of Dr. Susan Wachter, Petitioner's expert, fails to survive scrutiny. On page 4 of their Opposition Brief, Respondents state that Dr. Wachter relied solely on information contained in a 1990 census report as the basis for her study. This criticism is belied by both the trial testimony of Dr. Wachter and the report itself. As was established at trial, Dr. Wachter's research included detailed analysis of facts about the operation of the Fort Lee housing market for a three year period that were provided by the escrow fund mechanism administered by the United States District Court of the District of New Jersey (the "District Court") since 1993. Dr. Wachter's also testified that information provided by an affidavit submitted by the deputy tax assessor of the Borough of Fort Lee and the sworn deposition testimony of the Borough's rent leveling administrator were taken into account when she prepared her analysis.[2] Appendix E of Petition for a Writ of Certiorari at 110a, 113a, 117a.

Respondents criticize Dr. Wachter's analysis on the ground that it was limited to the "economic impact" of rent control without citing what other "facts" would be relevant to a determination of whether an economic regulation is justified or not. Respondents' Brief in Opposition at 4. This criticism is especially puzzling in light of the failure of Respondents' expert, Dr. Kenneth Baar, to produce any factual evidence, economic or otherwise, concerning the current Fort Lee market. Instead, Dr. Baar presented a series of hypothetical bases for rent control, such as "the preservation of affordable housing stock." Petitioners do not challenge that these

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2. Consequently, the substance of Respondents' criticism on page 11 of their Brief that Dr. Wachter did not "speak" to the tax assessor or rent administrator is unclear; presumably, the Respondents are not suggesting that such conversations would have contradicted the sworn testimony of representatives of these bodies.

abstractions can be a basis for a municipality's right to enact rent control; rather, the heart of Petitioner's argument is that there is no evidence that as applied to the Fort Lee housing market the Ordinance at issue has anything to do with realizing these principles.

Respondents also state that the analysis of Dr. Baar was "based upon a review of population income levels versus rents" without citing any evidence that such a review was undertaken with respect to Fort Lee. Respondents' Brief at 5. Not surprisingly, Respondents do not detail what the actual results were of this "review." In fact, Dr. Baar's determination that Fort Lee had a "shortage of affordable housing" was not based on any studies relating the income level of Fort Lee residents to prices in the housing market; absent such a comparison, there was no way to determine that such a shortage existed. Respondents' statement on page 5 of their Brief that Dr. Baar "reviewed records maintained by the Fort Lee Rent Leveling Board" is also misleading. In fact, Dr. Baar testified that he only looked at files for the buildings that he had been told were "most likely to have the most substantial rent increases."

REPLY TO RESPONDENTS' ARGUMENT

A. Unfounded Speculation Is Not A Sufficient Basis For The Imposition Of Rent Control.

Nowhere in their papers do Respondents contest Petitioner's assertion that the only basis in the record for the decision to uphold the Ordinance was testimony by Dr. Baar, that rent control *could*: (1) protect tenants from landlord harassment; (2) maintain affordable housing; and (3) prevent excessive rent increases. To the contrary, the Respondents cite the portion of the opinion that establishes that this testimony was the foundation of the District Court's decision to uphold the Ordinance. Respondents' Brief at 17-18. Respondents also fail to dispute Petitioner's argument that the mere recitation of these

platitudes in the absence of any evidence that such conditions either existed in Fort Lee or that the Ordinance alleviated such conditions was not a sufficient basis to find the Ordinance constitutional.

Respondents try to sidestep their inability to fill in this "missing link" by insisting that Petitioner failed in its proofs. To do this, Respondents misstate and simplify Petitioner's evidence by reducing it to a single equation that a vacancy rate above 5% indicated the absence of a housing shortage. Respondents' Brief at 11. While this proposition is true, as Dr. Baar conceded, Respondents do not neither address nor refute the following additional facts, which were established at trial:

- rents have been stable in Fort Lee since 1993;
- the Fort Lee housing market is competitive;
- there is no evidence that the Fort Lee housing market is a monopoly or oligopoly, or threatens to become either;
- the Ordinance impacts on less than one percent of the housing market;
- the data provided by the operation of the escrow fund demonstrated that negotiated rents frequently provided for less than the increase allowed under the rent control ordinance.

Appendices D, E and F of Petition for a Writ of Certiorari at 91a, 94a, 95a, 111a, 112a, 118a, 123a, 125a, 130a.

Ignoring the fact that none of the indicia usually cited as a predicate to rent control exist in Fort Lee, Respondents proceed by baldly stating that "there are a host of other legitimate reasons

to justify the imposition of rent control," without citing a single fact to establish that any of these other "legitimate reasons" has anything to do with the promulgation and application of the Ordinance. Respondents' Brief at 10. To the contrary, Respondents cite "addressing the inequities in the bargaining power between large apartment complex landlord and their tenants" as one such reason for rent control. *Id.* However, not only was the record completely devoid of any data confirming that such an inequity was present in Fort Lee, but the testimony established that because of market changes, especially the enormous number of conversions of rental buildings to condominiums and cooperatives, bargaining power was now in the hands of tenants. Similarly, Respondents cited the maintenance of affordable housing as a rationale for rent control. Respondents' Brief at 12. However, Respondents conceded that no studies comparing rent to occupant income were ever undertaken and, absent such a comparison, there is no way to determine whether or not there is a shortage of affordable housing.

Essentially, Respondents appear to argue that even when confronted with facts establishing the lack of a rational relationship between a price regulation and the market, a governing body has no obligation to produce a single shred of proof to the contrary. According to the Respondents' interpretation of the burdens of proof with respect to challenges to economic regulation, a defendant governing body becomes a perpetual moving target. Whenever a plaintiff presents facts showing that the usual justifications for government interference with the market are not present, all the municipality need do is come up with a speculative rationale untied to any actual scenario. Petitioner contends that this is not what the Court intended when *Pennell v. San Jose* was decided.

B. Dr. Baar's Speculative Testimony Had No Basis In The Facts Of The Present Fort Lee Housing Market.

Interestingly, Respondents do not dispute Petitioner's assertion that the sole basis for the District Court's decision to uphold the

Ordinance was Dr. Baar's testimony. Instead, Respondents contend that the testimony of both experts was arguably "unsubstantiated speculation" and then cite portions of the District Court's opinion that prove that Dr. Wachter's testimony was based on statistics gathered from the operation of the current Fort Lee market, while Dr. Baar's assertions were based on a twenty-year old study performed in a different city and state. Respondents' Brief at 18. Petitioner is hard pressed to think of a more telling example of the contrast between expert testimony that has a valid connection to the inquiry at hand (the present Fort Lee housing market) and expert testimony that has no such connection to the situation at issue. Clearly, Dr. Wachter's testimony, derived from the escrow fund established in this matter and the proofs provided by Fort Lee's own housing and tax officials, met the "valid connection" test for the determining the import of expert evidence established in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), while Dr. Baar's testimony did not. Therefore, the District Court's reliance on Dr. Baar's baseless speculations violated this Court's standards concerning the treatment of expert testimony.

CONCLUSION

For the reasons stated above and in Petitioner's initial brief, 440 Company respectfully requests that this Court grant its petition for a writ of certiorari.

Respectfully submitted,

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